

# Rule of Law in Times of the Populist Surge. Comments on Armin von Bogdandy and Michael Ioannidis

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I have read with great sympathy the innovative proposal of Armin von Bogdandy and Michael Ioannidis. It speaks out bluntly an alluring idea: How easy it may be to heal the deficiencies of state administration, if only we could appoint a few hundred well-educated, capable civil servants of high moral integrity at key positions of the Government. This seems to be a cure to be prescribed to states facing a crisis of the rule of law. There are, however, a couple of questions that need to be addressed in order for this proposal to be viable. I will take two of these, one concerns the democratic environment, the other one guarantees of the rule of law.

(1) The general background of my first remark is the populist surge in Europe and in the USA. The rise of Trumpism has sent many to search for the mistakes the liberal elites have made in fostering our liberal-democratic political and economic order. If successful, this soul-searching may lead to more inclusive politics that address the needs of those in the Western societies on the losing side of globalisation. One may hope that “bad” populism based on anger and hatred can be defeated by such “good” populism. In any case, the trend is definitely towards more democracy.

Against this background, replacing several hundred civil servants in key positions of the Greek administration by people from the Greek diaspora in accordance with the established competitive procedures of the European Commission and granting them European salaries from European resources could be seen extremely critical by those constituents who search for the source of evil outside of Greece. Not only could this fuel an unprecedented rise of populist parties in Greece but it could also serve as a perfect demonstration of those populist politicians in other European countries who try to demonise Brussels as a sort of colonising power. Hence, the implementation of the proposal would require a very high level of democratic legitimacy. The paper reflects on this by referring to the necessity of an approval of the appointments by the Greek authorities. I would suggest that we would need more than that. The proposed move is so bold that anything short of legitimisation by the Greek people would question its viability. I do not mean a referendum here. Rather, the reform should ideally be one of the central programs of a Greek Government or at least of important political parties.

Further, civil servants do not operate in a vacuum: They both execute and develop policies for which elected officials are responsible. The cooperation between politicians and civil servants presupposes a certain level of mutual trust and the capability of the elected officials to enthuse their constituents for the respective policy. Thus, elected officials must not conceive the project as imposed on them. Whether or not this is possible largely depends on the fatigue of the Greek people and their perceptions of their

own state administration and the European Union, respectively. The promise of an effective administration partly funded by EU sources might be alluring enough if the constituents blame their own political system for the misery of the country. If so, politicians may be ready to own the project and campaign on this promise. If not, they will probably sabotage or rebel against it. At present, there are at least some promising voices from Greece.

(2) My second remark roots in my specific Hungarian experience. The idea of elite change is not novel to me, yet the context is radically different. The policy of the Hungarian Government after 2010 was largely directed at carrying out such a change. The fact that parts of public administration or even of the judiciary deserved a thorough reform was beyond question. Yet, the execution of this policy has aptly demonstrated the resulting challenges the rule of law had to face. I analysed these in depth with my colleagues elsewhere.[1] I shall restrict myself to two specific examples here.

One of the examples relates to the dismissal of civil servants. In this case, a law made it possible to dismiss civil servants without giving any specific reason, in order to facilitate the hiring of new personnel in public administration. Both the Hungarian Constitutional Court and the ECtHR found that the measure violated the right of access to a court and thus the right to a fair trial.

The other example deals with an early retirement scheme for judges, prosecutors and notaries which substantially reduced the mandatory retirement age for this group. This was regarded by the Hungarian Constitutional Court as an infringement of the independence of the judiciary. Ultimately, the issue was resolved by the CJEU, which ruled that the measure was not proportionate and thus constituted an unlawful discrimination based on age.

These precedents indicate that the implementation of the proposal of Armin von Bogdandy and Michael Ioannidis requires a great deal of legal precision inasmuch it entails the early retirement or other form of dismissal of civil servants. Even more precaution is warranted in relation to the judiciary. An early retirement scheme for judges would probably not be unlawful under all circumstances. Yet the objectives must be very clearly set and the proportionality of the measure must be demonstrated.

This is not to say that the proposal of Armin von Bogdandy and Michael Ioannidis is not worth following through. On the contrary. As populism rises and crises of the rule of law emerge, we have to think out of the box. More of the same will not help, innovation is needed. I submit that the success of this innovative proposal would largely depend on the precision of the planning of the legal details and on securing sufficient democratic support.

[1] Pál Sonnevend, András Jakab and Lóránt Csink, *The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary*, in: Armin von Bogdandy – Pál Sonnevend, *Constitutional Crisis in the European Constitutional Area, Theory, Law and Politics in Hungary and Romania*, Hart Publishing 2015.

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